

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

ILLINOIS POWER AGENCY)	
)	
)	ICC Docket No. 16-0453
Petition for Approval of the 2017)	
Illinois Power Agency Procurement Plan)	
Pursuant to Section 16-111.5(d)(4) of the)	
Public Utilities Act)	

**VERIFIED OBJECTIONS/COMMENTS OF THE
PEOPLE OF THE STATE OF ILLINOIS TO THE
2017 ILLINOIS POWER AGENCY PROCUREMENT PLAN**

The People of the State of Illinois, through Lisa Madigan, Attorney General of the State of Illinois, hereby file their Verified Objections/Comments to the Illinois Power Agency’s (“IPA”) 2017 Procurement Plan in accordance with the filing requirements of Section 16-111.5(d)(3) of the Public Utilities Act (“the Act”). 220 ILCS 5/16-111.5(d)(3)

I. INTRODUCTION

Section 16-111.5B of the Act requires the IPA to include within its annual Procurement Plan, “an assessment of opportunities to expand the programs promoting energy efficiency measures that have been offered under plans approved pursuant to Section 8-103 of this Act or to implement additional cost-effective energy efficiency programs or measures.” Under this provision, Utilities Commonwealth Edison Company (“ComEd”) and Ameren Illinois Company (“Ameren”) procure these additional opportunities through a third-party bidding process that includes issuing a request for proposals (“RFP”). 220 ILCS 5/16-111.5(a). The Act requests a utility to “develop requests for proposals consistent with the manner in which it develops requests for proposals under plans approved pursuant to Section 8-103 of this Act, which considers input from the Agency and interested stakeholders.”

The People's Verified Comments will address the energy efficiency procurement portions of the 2017 Procurement Plan ("Plan"). As discussed below, the People seek Commission findings in this proceeding that will help ensure that the third-party efficiency program contracts procured pursuant to Section 16-111.5B of the Plan are negotiated by the Utilities with the same scrutiny that they apply to the contracts procured under Section 8-103 of the Act. In addition, among other requests, the OAG Comments seek specific Commission direction on ensuring that the potential studies conducted by the Utilities and paid for by ratepayers are utilized to help improve and refine bids received by the Utilities as part of this procurement process. Finally, the OAG asks the Commission to direct Ameren to analyze energy efficiency program bids in a manner that is consistent with the Act by including in its assessment of cost-effectiveness natural gas and other savings associated with a proposed program.

II. OBJECTIONS/COMMENTS TO THE 2017 IPA PLAN

A. Section 9.4.1 -- Scale of Section 16-111.5B Programs

1. *The Commission Should Require Program Administrator RFPs to Include Greater Outreach in the Solicitation Bids and Utilization of the Utilities' Potential Studies for Third-Party Programs.*

At pages 111 of the Plan, the IPA ponders the unexpected result of this year's RFP process – that Section 16-111.5B programs may have peaked in the 2016-2017 delivery year. The IPA aptly acknowledges that given that "bidders continue to become more familiar with the Section 16-111.5B process, and given that this year's RFP offered programs for three years in length, this phenomenon is unexpected." *Id.* The IPA, too, rightly wonders that while it is possible that the lower numbers of bids "could constitute an accurate reflection of the market for energy efficiency in Illinois", another possible explanation for the decline is "an indicator of barriers to participation by potential bidders." *Id.* at 113-114. The IPA suggests that if it is the

latter, utilities could conduct more extensive outreach to disseminate the RFPs in order to find new potential bidders. The People concur on this point, and urge the Commission to require that the 2018 procurement process reflect the consensus of these discussions in improving efforts at disseminating the RFP – particularly if smaller, less-nationally established companies are to compete in the bid process.

The People also support a Commission finding that Utilities be directed to include in the Section 16-111.5B RFP process specific solicitations for programs that reflect the findings of the Potential Studies required under Section 16-111.5B(a)(3)(A) of the Act. While the IPA notes that such an effort might solicit “new” programs, perhaps another result might be bids for expansions of programs that compete in a cost-effective manner with existing utility programs that reflect the identified potential in the market. The People concur with the IPA’s acknowledgement that “[t]hese studies are extensive and paid for by ratepayers, and often yield rich information regarding potential energy efficiency program opportunities.” Plan at 111.

The OAG urges the Commission to adopt these as specific findings in its Order in this Docket, both to ensure that cost-effective opportunities for energy efficiency are not being left on the table and to ensure the cost-effectiveness of required Potential Studies.

B. Section 9.4.2 – Improving/Refining Bids

1. The Commission Should Direct the Utilities to Ensure that Section 16-111.5B Contracts Receive the Same Level of Scrutiny as Section 8-103 Contracts.

At page 106 of the Plan, the IPA states that it believes that significant and meaningful progress was made in the consideration of five issues that remained unresolved in the previous IPA Procurement Plan proceeding, ICC Docket No. 15-0541, related to the procurement of energy efficiency, and that were addressed in SAG-facilitated workshops at the direction of the

Commission. The People agree with that sentiment generally, but take issue with the IPA's conclusion that the Commission need not be consulted for direction on an issue related to the scrutiny the Utilities apply to Section 16-111.5B contracts. In discussing the Commission's directives to the IPA and the Utilities in the 2016 Procurement docket, ICC Docket No. 15-0541, the Plan states:

While the fourth and fifth issues resulted in minor unresolved differences between parties — an expected result when parties are working in good faith toward solutions but have different perspectives, different experiences, and are accountable to different constituencies — *none were so significant that the IPA believes further clarification from the Commission is absolutely necessary for approval of the 2017 Plan and proposed energy efficiency programs.*

IPA Plan at 106 (emphasis added). The fact is, however, the Commission specifically required the Utilities in their last Procurement Order in Docket No. 15-0541 to develop a plan to ensure that Section 16-111.5B contracts receive the same level of scrutiny as Section 8-103 contracts in terms of minimizing cost to the ratepayer and maximizing energy savings achieved. The Commission's Final Order in ICC Docket No. 15-0541 Final Order stated:

It seems to be a simple matter to require the same level of scrutiny for Section 16-111.5B contracts as that which is imposed for Section 8-103 contracts. The utilities are directed to develop a plan to implement use of the same scrutiny for Section 16-111.5B contracts as that for Section 8-103 contracts through workshops conducted by the SAG.

ICC Docket No. 15-0541, Order of December 16, 2015 at 110. The IPA's Plan recognizes the potential impact on ratepayer costs and savings achieved in acknowledging the gray area that exists in IPA energy efficiency bids between a bid that passes the cost-effectiveness test of Section 16-111.5B but likewise allows for "bidders to propose programs with excessive

administration costs by finding headroom in the TRC analysis.” IPA Plan at 111. The fact is neither utility developed the plan requested by the Commission to ensure equivalent contract scrutiny.

For example, as noted in the SAG Facilitator’s “Report from the Illinois Energy Efficiency Stakeholder Advisory Group (IL EE SAG) 2016 Section 16-111.5B Workshop Subcommittee” (“2016 SAG Report”), attached to the IPA Plan as Appendix H, while each utility appears to attempt to clarify uncertain terms with a bidder, no effort is made to negotiate prices or improve savings performance projections either before or after submission of the RFP responses to the IPA.¹ The Report’s description of both Ameren and ComEd bid practices makes clear that no attempt at negotiating price and savings terms is made once a bid is received or after the Commission approves the program’s inclusion in the Plan.² On the other hand, the Utilities verified during the IPA workshop sessions that discussions related to improving savings and/or budget terms are common practice for Section 8-103 contracts. The Facilitator’s Report states:

Section 8-103 contracts between utilities and vendors include general conditions, price, holdback, savings, and implementation details. Utilities negotiate contract terms to ensure high-quality, well-priced programs.

See Facilitator’s Report (Appendix H of the IPA Plan) at 19.

The bottom line is that the IPA programs, both in terms of the statutory intent of enabling “expansions” of Section 8-103 program and in terms of the costs, which are charged to

¹ The Facilitator’s Report states, “In light of the regulatory process as well as the pay for performance contract structure, Ameren Illinois does not engage in contract price negotiations for approved Section 16-111.5B programs.” Report at 14. As for ComEd, the Report states, “ComEd does not necessarily review contracts for price issues for approved Section 16-111.5B programs, as pay-for-performance contracts are utilized.” *Id.* at 15.

² The Report states, “ComEd does not necessarily review contracts for price issues for approved Section 16-111.5B programs, as pay-for-performance contracts are utilized.” *Id.* at 15.

ratepayers via the same rider that recovers costs for Section 8-103 programs, should not be treated differently by the Utilities for purposes of ensuring maximum energy savings delivered at the least cost to ratepayers than those secured under Section 8-103 contract provisions. These programs, whether delivered as a result of Section 16-111.5B procurements or through Section 8-103 requirements, are still subject to the least cost provisions of the Public Utilities Act. Those provisions mandate that utility service – which clearly includes the provision of ratepayer-funded energy efficiency programs – shall be least cost. *See* 220 ILCS 5/8-401. (“Every public utility subject to this Act shall provide service and facilities which are in all respects adequate, efficient, reliable and environmentally safe and which, consistent with these obligations, constitute the least-cost means of meeting the utility's service obligations.”) *See also* 220 ILCS 5/1-102. (“The General Assembly finds that the health, welfare and prosperity of all Illinois citizens require the provision of adequate, efficient, reliable, environmentally safe and least-cost public utility services at prices which accurately reflect the long-term cost of such services and which are equitable to all citizens.”)

In order to ensure that “least cost” obligation is satisfied, the People urge the Commission to require the Utilities to treat Section 8-103 and 16-111.5B contracts the same in terms of ensuring the best contract terms for ratepayers, who ultimately foot the bill for all utility-administered energy efficiency programs in Illinois. As noted above and acknowledged by the IPA, the Commission already required the utilities to submit a plan in its decision in Docket No. 15-0541 last year, through the IPA workshop process, with no consensus reached on that point. That conclusion and finding should not be ignored once again.

In order to ensure that the Utilities apply the same scrutiny to IPA contracts as Section 8-103 contracts, the Commission should order the Utilities to include, in their RFPs, notice to

vendors that the Utilities shall, after Commission approval of a program that passes the TRC and performance risk criteria, as a condition of the contracting process: (1) scrutinize the cost per kilowatt hour saved to ensure that the price, while passing the TRC, is not inflated and if necessary, negotiate a reduced cost consistent with the Utility's Section 8-103 contracting practices; and (2) scrutinize the implementation strategy and program design, including the energy efficiency measure mix, to ensure that the program is consistent with best practices. All modifications to the programs and forecasted costs should be reported to the Commission prior to the start date of the 2017 Procurement Plan. The bottom line is that the Commission should ensure that these programs are as cost-effective as the programs approved under Section 8-103 of the Act. Ratepayers pay for both these programs through the single energy efficiency rider. There should be no difference in Commission, utility or ratepayer expectations that the programs that are being financed by utility customers are worth the dollars spent and indeed cheaper than the cost of energy supply.

2. The Commission Should Clarify RFP Terms To Ensure that Bidding and Contract Requirements Achieve the Right Balance of Terms to Both Protect Ratepayers While Not Disqualifying Smaller Vendors.

At page 111-113, the IPA discusses various, differing contract requirements for Section 16-111.5B programs that are purported to achieve the goal of striking the required balance between protecting ratepayer interests in not paying for programs that fail to achieve forecasted goals on the one hand, and ensuring that contract requirements are not so strict as to limit the ability of smaller-sized vendors from submitting bids in response to the Utilities' RFPs on the other. IPA Plan at 111-113. The Plan notes, for example, that Ameren's RFP requires vendors to submit surety bonds as a part of the bid/contract process. IPA Plan at 112. The Plan also

references pay for performance terms and holdback provisions that defer payment of a certain percentage of a monthly invoice amount pending final evaluation of the program.

In addition, holdback provisions vary between utilities. According to the SAG 2016 Section 16-111.5B Workshop Report (“SAG IPA Report”), Ameren employs a holdback of five percent (5%), subject to final evaluation results³⁶; and 3) requires vendors to obtain a surety bond for twenty-five percent (25%) of the annual contract cost. SAG IPA Report at 16, though changes in this approach will be made as appropriate.

Upon information and belief, some local vendors of limited size have complained about their inability to compete against larger, national vendors who have the ability to absorb high-priced surety bonds or extensive holdback provisions. The fear is that these terms may in fact limit competition for programs, thereby discouraging smaller vendors with innovative program ideas from bidding. In addition, presumably, bids that include surety bonds reflect these additional costs in the price per kilowatt hour proposed for the program.

For example, are the requested budgets increased by vendors in order to compensate for these more draconian contract terms? And are these additional contract terms simply designed to protect utility shareholder risk? The IPA notes that “It is unclear to the Agency whether a measure such as surety bonds is necessary given the pay-for-performance nature of Section 16-111.5B energy efficiency contracts, and if a surety bond requirement produces a chilling effect on participation, it could actually have a net negative impact on ratepayers by reducing the number of cost-effective programs included in the IPA’s electricity procurement plan.” IPA Plan at 114.

The IPA further notes that “this is an issue for which the Agency has limited visibility as to its impacts.” *Id.* In light of this lack of data and expertise, the People urge the Commission to seek specific evidence on what constitutes the right balance of protecting ratepayer interests in

funding only quality, cost-effective programs and not making contract provisions so draconian that smaller bidders are discouraged from participating in the bidding process. While the workshop process has been effective at reaching consensus on many issues, reaching agreement on the nature and details of contract terms and negotiations after the Commission approves a program has proven elusive. Such direction is essential to ensuring that ratepayers are not paying more than they should for an energy efficiency program, and that smaller potential vendors are not unfairly shut out of the bid process before it begins.

C. Section 9.5.3 -- Review of Ameren Illinois TRC Analysis

1. *Ameren's EM&V Adder Exceeds the Statutory 3% Cap.*

At page 115 of the Plan, the IPA notes that according to its submittal, Ameren's 11.89% administrative cost adder is composed of a 3.97% adder for Evaluation, Measurement and Verification, as compared to 3.5% last year). Plan at 115. The People note that this 3.97% adder exceeds the statutory cap for EM&V of 3 percent, as provided in Section 8-103(f)(7) of the Act. It is unclear why evaluation of IPA programs would exceed this cap, which the General Assembly deemed reasonable in its consideration of Section 8-103 programs.

While the IPA notes in its Plan that the "small changes to the administrative adders which could come from minor adjustments would not appear to impact which programs pass or fail the TRC", the fact is program costs are increased when unexplained administrative costs are added to the cost per kWh saved. The Commission should direct Ameren to remove a minimum of .97% from its assumed IPA portfolio evaluation costs.

2. *The Utilities' TRC Analysis Should Be Transparent and Inclusive of All Relevant Savings.*

The IPA notes that it continues to have reservations about the methodology used by Ameren Illinois to calculate the cost of supply, noting that one program which passed the TRC test failed the Ameren Illinois Cost of Supply test. IPA Plan at 115. It is the People's understanding that Ameren's methodology may exclude avoided transmission and distribution costs. Such a position is contradicted by the General Assembly's specific finding that "[r]equiring investment in cost-effective energy efficiency and demand-response measures will reduce direct and indirect costs to consumers by decreasing environmental impacts *and by avoiding or delaying the need for new generation, transmission, and distribution infrastructure.* 220 ILCS 5/8-103(a) (emphasis added). Unless it can be shown that Ameren is accounting for these avoided costs in some other aspect of the TRC calculation, the Commission should include a finding that those costs be reflected by the Utilities in its Order in this docket.

Also, in examining the cost-effectiveness of programs designed for residential customers, and in particular, low income customers, avoided costs should include assumptions about reduced billing and collection costs. In general, it is unclear what Ameren's assumptions were regarding avoided costs in its TRC calculation. It is the People's understanding that the Ameren cost-effectiveness tool and related assumptions are not public. It is unclear to the People why these inputs are kept confidential. Absent a compelling explanation from a utility, the People urge the Commission to require Ameren to make these costs public.

D. Section 9.5.4 – Programs Deemed “Not Responsive to the RFP” by Ameren Illinois

The People Concur with the IPA's Objection to Ameren's Exclusion of Programs With Gas Savings

In Section 9.5.4 of their Plan, the IPA states its objections to Ameren's decision to label two programs as "Not Responsive" and ineligible for inclusion in the IPA procurement plan because they happened to include gas savings. IPA Plan at 116. The People concur with the IPA's legal analysis on this point, and support the IPA's objection to the Company's exclusion of a program because it includes natural gas savings. As the IPA notes, "cost-effective" means that the measures satisfy the total resource cost test, which requires that the TRC analysis count, as a benefit, "other quantifiable societal benefits, including avoided natural gas utility costs." 220 ILCS 5/8-103(a); 20 ILCS 3855/1-10; IPA Plan at 116.

As the IPA correctly notes, past practice under Section 16-111.5B has been to count all gas savings in cost-effectiveness calculations, and that Ameren's proposed exclusion of a program marks a clear departure from prior proceedings. *Id.* at 117. These programs should be included in the Plan, assuming they pass the cost-effectiveness test.

E. Section 9.5.5 -- Duplicative Programs

The IPA's Proposed "Conditional" Approval of the Ameren SBDI Program, Based on the Company's Claim That the Program is Duplicative, Should Be Rejected.

The IPA notes at page 120 of its Plan that because "Section 8-103 programs had not yet been approved (or even formally proposed) at the time Ameren Illinois provided its submittal to the IPA, no proposed Section 16-111.5B program can be considered "duplicative" of any existing Section 8-103 program." The People concur – particularly since the Ameren RFP made clear to vendors that the bid was open-ended and that no Section 8-103 programs were yet in place for the 2017-2020 time period.

The IPA offers one solution to the issue of duplicative programs, and in particular related to a bid for a Small Business Direct Install ("SBDI") program that the IPA suggests may be

duplicative: potential conditional approval of the SBDI program if the Commission approves an Ameren-sponsored SBDI program in its Section 8-103 program filing in Docket No. 16-0413. IPA Plan at 120. The People urge the Commission to reject that proposal. The SBDI program at issue in this docket could be not duplicative of Ameren's proposed SBDI program, which has not yet been approved. Even if it is approved under Section 8-103, the Commission should not reject a similar program here. At worst, it would constitute an expansion of any approved SBDI program. However, given the open-ended RFP utilized by the Company, and the fact that no Section 8-103 SBDI program yet exists, it is the Section 8-103 program that would qualify as an expansion of the IPA portfolio program, not the opposite.

This point is particularly true in light of the IPA's expressed concern with Ameren's open-ended request to declare a program duplicative:

AIC may seek approval of programs as part of its Section 5/8-103 and Section 5/8-104 Plan that would render certain programs to be approved as a part of the Procurement Plan duplicative, and may seek conditional findings in this docket to provide for such an outcome.

IPA Plan at 123. This request runs contrary to the open-ended nature of the Ameren RFP, which, as noted above, indicated to bidders that no Section 8-103 programs were in place for the relevant time period. The IPA notes this request "changes the playing field for bidders after the fact through allowing a participating utility to receive bids under an open-ended RFP, but then to potentially shape its Section 8-103 portfolio so as to disqualify certain third-party bids after their receipt and analysis." IPA Plan at 123. The IPA is correct in raising this issue with the Commission. The Commission should expressly exclude such language in any IPA Plan, and prohibit its inclusion in future RFPs. Such language, if approved, would likely dissuade

potential vendors from taking the time to prepare an RFP, if not incent vendors to include additional costs as a way to limit financial risk from unexpected changes in the bid review process.

III. CONCLUSION

In accordance with the recommendations above, the People of the State of Illinois respectfully request that the IPA incorporate the comments and conclusions provided above in its final Procurement Plan.

Respectfully submitted,

People of the State of Illinois
By Lisa Madigan, Attorney General

By: ____/s/_____
Karen L. Lusson
Assistant Bureau Chief
Public Utilities Bureau
Illinois Attorney General's Office
100 West Randolph Street, 11th Floor
Chicago, Illinois 60601
Telephone: (312) 814-1136 (Lusson)
Email: klusson@atg.state.il.us

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